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In The

Supreme Court of the United States

October Term, 1971

No. 71-636

COMPANIA ANONIMA VENEZOLANA DE NAVEGACION (VENEZUELAN LINE),

Petitioner,

against

WESTINGHOUSE ELECTRIC INTERNATIONAL CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE UNITED STATES, FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE UNITED STATES, FOR THE SECOND CIRCUIT

Compania Anonima Venezolana De Navegacion (Venezulan Line), prays that a writ of certiorari issue to review that part of the final judgment of the United States Court of Appeals for the Second Circuit, entered on August 16, 1971 which denied Petitioner's claim for indemnity against the Respondent, Westinghouse Electric International Co.

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York, printed in the Appendix herein (*infra,* pp. 1a-13a)* has not been officially reported. ported.

* Numerical references followed by "a" are to the Appendix.

The opinion of the Court of Appeals for the Second Circuit printed in the Appendix herein (*infra,* pp. 16a-23a) is reported at 446 F. 2d 1339 (1971).

Jurisdiction

The decision of the United States Court of Appeals for the Second Circuit is dated August 16, 1971 (16a).

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Is not the decision by the Court of Appeals for the Second Circuit in the instant case contrary to the decision by the Court of Appeals for the Third Circuit in the case of *Williams* v. *Ocean Transport Lines,* 425 Fed. 2d 1183 (1970) and that of the Court of Appeals for the Ninth Circuit in *Simpson Timber Co.* v. *Parks,* 390 F. 2d 355 (1968 cert. denied 383 U.S. 858), in that it holds that the Petitioner was not entitled to indemnity from the Respondent on the ground that there was an implied in fact warranty by Westinghouse Electric International Co. that the packaging which contained the transformers was suitable for its foreseeable use as a walking floor for the longshoremen?

2. Did the Circuit Court of Appeals improperly extend the Carriage of Goods by Sea Act 1936, Title 46 U.S.C.A. Section 1304 (3) to an action which involved injury to a longshoreman and not damage or loss to cargo?

Statement of the Case

Respondent Westinghouse Electric International Co. (herein "Westinghouse") delivered to Compania Anonima Venezolana De Navegacion (herein "Venezuelan Line")

for carriage from New York to LaGuaira aboard the M. V. "Ciudad De Barquisimeto" a cargo consisting of transformers packed in wooden crates.

Venezuelan Line employed John W. McGrath Corporation to load the ship. While McGrath's employee, Simon Williamson, was working in the hold of the M. V. "Ciudad De Barquisimeto" loading crates of transformers shipped by Westinghouse, a slat in one of the crates broke causing the longshoreman to sustain injuries.

The jury found in favor of the Plaintiff and against the Venezuelan Line. The District Court ruled that there was no evidence that the crates were intended and therefore warranted for use as a walking floor for longshoremen. It therefore dismissed the Petitioner's impleading petition against Westinghouse.

The Court of Appeals affirmed the judgment of the District Court holding that Westinghouse could not be held liable under the Carriage of Goods by Sea Act, 46 U.S.C.A. Sec. 1304 (3) in the absence of evidence that Westinghouse was negligent. The Court reasoned, that the action was governed by the Carriage of Goods by Sea Act, 46 U.S.C.A. Section 1304 (3) which reads as follows:

> "The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants."

Reasons for Granting the Petition for a Writ of Certiorari

Re: The First Question Presented.

The Court of Appeals, having failed to find that Westinghouse impliedly warranted that the packaging which contained the transformers was suitable for its foreseeable use as a walking floor for longshoremen, is clearly in

conflict with the holding by the Third Circuit in *Williams* v. *Ocean Transport Lines, supra,* wherein the Court wrote as follows at pages 1186, 1187:

> "Nor is the warranty lessened or avoided by the absence of negligence on the part of the warrantor who furnished the equipment which caused the condition of unseaworthiness" • • •
>
> "Moreover, this indemnity contract, implied in maritime law, runs not only from stevedores but from shippers whose manner of packaging their merchandise produces a condition of unseaworthiness. *Simpson Timber Co.* v. *Parks,* 390 F. 2d 353 (9 Cir. 1968), cert. denied, 393 U.S. 858, 89 S. Ct. 126, 21 L. Ed. 2d 127 (1969), and from ship repairers. *Grisby* v. *Coastal Marine Services of Texas, Inc.,* 412 F. 2d 1011, 1040 (5 Cir. 1969); *McLaughlin* v. *Trelleborgs Angfartygs A/B,* 408 F. 2d 1334 (2 Cir. 1969), cert. denied, 395 U.S. 946, 89 S. Ct. 2020, 23 L. Ed. 2d 464 (1969). In short, the vessel is entitled to indemnity from whatever third party causes the condition of unseaworthiness producing the injury."

The decision by the Circuit Court of Appeals further conflicts with *Simpson Timber Co.* v. *Parks, supra,* wherein the Court for the Ninth Circuit wrote as follows at pages 355 and 356:

> "The shipowner's liability thus rested solely upon the shipowner's breach, without fault, of its nondelegable duty to provide the longshoreman a safe place to work, and the unseaworthy condition was created solely by the manufacturer's wrongdoing. When the shipowner pays the judgment and thus discharges the manufacturer's obligation, the manufacturer cannot equitably be permitted to retain the benefit thus conferred. In these circumstances, settled principles of quasi-contract require the manufacturer to hold the shipowner harmless."

"Moreover, by imposing ultimate liability upon the negligent manufacturer, the loss is placed upon the actor whose default caused the injury. The one best able to eliminate the risk is given the greatest incentive to do so."

and in addition thereto the following language is found in the footnote of said opinion at page 355 and at page 356:

"In sustaining the district court's judgment granting indemnity against the manufacturer on this ground, we do not mean to suggest that other grounds, not advanced by the shipowner on appeal, would not serve as well. Possible alternative grounds are: (1) that the shipowner was entitled to the benefits of the *express contractual obligation* of the manufacturer to the shipper to package the doors suitably for export, which, if discharged, would have satisfied the shipowner's obligation to provide a safe place to work, and whose breach had the foreseeable consequence of the shipowner's liability to the longshoreman for unseaworthiness [cf. Crumady v. The J. H. Fisser, 358 U. S. 423, 428, 79 S.Ct. 445 3 L.Ed.2d 413 (1959); Rederi A/B Nordstjernan v. Crescent Wharf & Warehouse Co., 372 F. 2d 674, 677 (9th Cir. 1967); Williams v. Pennsylvania R.R. Co., 313 F.2d 203, 210-212 (2d Cir. 1963); De Gioia v. United States Lines Co., 304 F.2d 421, 425-426 (2d Cir. 1962); Restatement, Contracts §§ 133(1) (b), 141 (1932)]; (2) *that the shipowner was entitled to recover damages, similarly measured, for breach by the manufacturer of implied-in-fact warranty that the packaging was suitable for its foreseeable use as a working floor for the longshoreman* [cf. Eastern Motors Express. Inc. v. A. Maschmeijer, Jr., Inc., 247 F.2d 826, 828, 65 A.L.R.2d 765 (2d Cir. 1957); Luckenbach S.S. Co. v. Coast Mfg. & Supply Co., 185 F.Supp. 910, 922 (E.D.N.Y.1960)]; or (3) that in negligently packaging the doors the manufac-

turer violated a *duty owed directly to the shipowner to exercise reasonable care* to avoid the foreseeable harm of the shipowner's liability to the longshoreman [cf. Williams v. Pennsylvania R.R. Co., 313 F.2d 203, 212 (2d Cir. 1963); De Gioia v. United States Lines Co., 304 F.2d 421, 425-426 (2d Cir. 1962)."

The Court of Appeals while recognizing the unfairness of holding that the shipowner could recover from the shipper only upon proof of the negligence of the shipper (p. 22a), failed to recognize that the shipper nevertheless should be held liable where the proof was uncontradicted that the injury was caused solely by the use of a defective cargo container furnished by the shipper.

With millions of tons of cargo being shipped annually from United States Ports in packages there is no doubt that it is most important for the shipping industry to have a uniform maritime law; and an unwarranted burden is placed upon the shipowner who is unable to rely on the implied warranty of the shipper who furnished the package that it was suitable for use as a walking floor by longshoremen.

Re: The Second Question Presented.

The Circuit Court in denying indemnity to Venezuelan Line predicated its findings upon Title 46 U.S.C.A. Section 1304 (3) which it stated was applicable to an action involving a personal injury to a longshoreman with no claim by any party for loss or damage to goods. The United States Carriage of Goods by Sea Act, was enacted solely for the purpose of governing the duties and rights of a carrier and vessel toward a shipper's cargo.

It is to be noted from a reading of the entire chapter that its scope deals with contracts of carriage of goods by sea to and from United States Ports in foreign trade. The Court of Appeals nevertheless, on the basis of a Dis-

trict Court decision, to wit, *Serrano* v. *United States Lines,* 238 Fed. Supp. 383 (S.D.N.Y. 1965) held that 46 U.S.C.A. Section 1304 (3) applied to the suit in question and no liability would be imposed upon the shipper without proof of fault or neglect on its part or on the part of its agents, servants or employees.

The broad meaning which the Court read into the aforementioned Section of the Carriage of Goods by Sea Act is unwarranted. The Act is restricted only to actions for loss or damage which are related to the cargo owner's goods and not to actions arising out of injury to persons.

In *States Steamship Company, et al.* v. *American Smelting and Refining Company,* 339 F. 2d 66 (1964 cert. denied 85 S. Ct. 1109), the Circuit Court of Appeals for the Ninth Circuit in holding that an action for indemnification was not governed by the one (1) year limitation provision of the Carriage of Goods by Sea Act and thereby refused to extend that Act to an action other than for loss or damage to cargo wrote as follows at page 68 and at page 69:

> "The cases are not at variance with this view. The limitation provision of Section 3(6) has been applied mainly to instances involving damage directly to the cargo. It has also been applied where there has been delay in, or failure of, delivery or departure. • • • In the above cited cases the damage arose directly from and was related directly to a failure to make a proper delivery of the cargo owner's goods.
>
> This Act, derived from the terms of the Brussels Convention of 1924, has been adopted by many nations, but in no case that has come to our attention has it been held that an action by a cargo owner to recover salvage paid is within the limitation provision here under consideration. A contention similar to this, however, was presented in the case of Goulandris Bros., Ltd. v. B. Goldman & Sons, Ltd., [1957] 2 Lloyd's Rep. 207 (Q.B.D., Com.Ct.), and was rejected. There,

> at page 222, the court stated that 'the loss or damage referred to must be loss or damage which is related to the cargo owner's goods.' Appellant states that the rule in Goulandris was overturned by the subsequent House of Lords decision in Anglo-Saxon Petroleum Company v. Adamastos Shipping Company, Ltd., [1957] 1 Lloyd's Rep. 79 (Q.B.D.), [1957] 2 All E.R. 311 (C.A.), [1958] 1 All E.R. 725 (H.L.). We do not so read that case. The British authorities, though they now indicate that the words 'loss or damage' in the limitation provision here involved are broad enough to include loss by delay or misdelivery, do not go so far as to say that a claim such as is presented in the instant case constitutes a suit for 'loss or damage' within such provision. See Carver, 2 British Shipping Laws §§ 224-30 (1963)."

The Carriage of Goods by Sea Act was enacted to create international uniformity, with reference to the carriage of cargos between foreign nations and it is a counterpart of the British Carriage of Goods by Sea Act, 1924.

In commenting upon the counterpart of 46 U.S.C.A. Section 1304 (3) found in the British Carriage of Goods by Sea Act 1924 Article 4, Section 3 whose language is similar to the companion United States statute, Carver in Two British Shipping Laws, Section 230 (1971) wrote as follows at pages 198 and 199:

> "Art. IV, r. 3. Art. IV, r. 3, exempts the shipper from liability 'for loss or damage' sustained by the carrier or the ship in certain circumstances. In this context those words would appear apt to cover loss to the carrier apart from physical damage to the ship, e.g. damage to other shippers' goods for which he is liable. It is doubtful, however, even if in this context the words are sufficiently wide to cover such matters as demurrage which are wholly unconnected with

physical loss or damage, and are topics which the whole scheme of the Rules leaves to be dealt with by special contract between the parties."

In *Toho Bussan Kaisha, Ltd.* v. *American President Lines,* 155 F. Supp. 886 (1957 D.C. S.D.N.Y.), affirmed 265 F. 2d 418 (2 Cir. 1959) the Court in stating that the Carriage of Goods by Sea Act applied only to actions involving physical loss or damage to goods wrote as follows in a footnote at page 889):

> "It has also been held that the Carriage of Goods by Sea Act relates only to physical loss or damage of the goods. See United Merchants and Manufacturers v. United States Lines, 204 Misc. 989, 126 N.Y.S. 2d 560, 562. This was apparently conceded in United States v. Wessel Duval & Co. D.C. 115 F. Supp. 678, 680."

The District Court in *Atlantic Mutual Insurance Company* v. *Poseidin Schiffahrt,* 206 Fed. Supp. 15 (1962 D.C., N.D. Ill. E.D.), affirmed 313 F. 2d 872 (7 Cir. 1963), cert. denied, 375 U.S. 819 held in an action brought by an assurer of a shipper against the carrier for damages arising out of an overcharge and late delivery of goods that the Act only applied to an action for physical loss or damage to goods and wrote as follows at page 17:

> "At any rate, the parties admit that there was no physical loss or damage to the goods. Hence, 46 U.S.C.A. Sec. 1303(6) does not apply to the case at bar."

It is of paramount importance to the shipping industry that this Court decide whether or not the Carriage of Goods

by Sea Act 1936 46 U.S.C.A. Section 1300 *et seq.* is applicable only to actions involving physical loss or damage to cargo or whether it should be extended to cover actions other than those involving damage or loss to cargo.

CONCLUSION

It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by petitioner.

Respectfully submitted,

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APPENDIX

District Court Opinion

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[TITLE.]

MURPHY, D. J.:

Plaintiff, a longshoreman, brought this action against the Venezuelan Line and Westinghouse, claiming that he sustained injuries aboard a ship of the Venezuelan Line because of the negligence of the shipowner, the unseaworthiness of the ship and, also, the negligence of Westinghouse. The Venezuelan Line in turn filed third party complaints against Westinghouse and John W. McGrath Corporation, the stevedore and plaintiff's employer, claiming indemnity.

At a jury trial plaintiff testified that in the lower hold of number 5 hatch while he and other men were on top of some wooden crates containing transformers pushing a draft of dunnage which was suspended from a boom, one of the slats of one of the crates gave way causing his left foot to sink between the transformer and the crate causing him to fall and injure his left arm. His witness testified that the slats were about 1/2" thick.

Plaintiff also offered evidence showing that Westinghouse delivered to the ship 102 crates, each containing a transformer, and that they were stowed in number 5 hatch; 85 in the lower hold and the balance (17) in the 'tween deck of that hold; also expert testimony was given that according to the Westinghouse specifications for the making of the crates, such crates should have been able to sustain the weight of a 250 lb. man. In addition, expert opinion was received that it was good stevedoring practice for longshoremen to walk on such crates in the performance of their work.

District Court Opinion

After the plaintiff rested Venezuelan Line offered no evidence. Westinghouse offered expert testimony to show that by the proper use of the ship's booms there would be no need for longshoremen in the hold to push a draft of dunnage. This expert also, in interpreting the cargo plan, said that the transformers were the last cargo stowed in number 5 hatch and were not on the deck of the hold but rather in the 'tween deck. He also testified that if the crates were 1/4" thick they would be unsafe for men to walk on but not unsafe if they were 1" thick.

The case was submitted to the jury only on the plaintiff's case against the Venezuelan Line and Westinghouse on the issues of liability and damages. We charged:

> "Now, if you accept the plaintiff's testimony and that of his witnesses, that he was injured in the lower hold of Hatch No. 5 when a slat on a crate on which he was standing during the course of his work broke, then you must find that the shipowner was [is] liable to the plaintiff. This is so because in these maritime cases the presence of a defective cargo container or crate causing injury renders a vessel unseaworthy even though the injuries were caused by a latent defect in such container or crate.
>
> "However, if you do not accept such testimony, and you find that the transformers were not stowed in the lower hold of Hatch No. 5 but rather were stowed in the uppermost part of that hold just beneath the 'tween deck, or that the plaintiff was injured in the hold of Hatch No. 2 or 3, then you must return a verdict in favor of both defendants, the shipowner and Westinghouse.
>
> "Now, on the question of whether Westinghouse is liable to the plaintiff on the plaintiff's claim that Westinghouse was negligent, the issues are quite different. For example, Westinghouse has no ob-

ligation whatsoever to furnish a seaworthy ship to the plaintiff. It has no obligation to provide plaintiff a safe place to work. And before you even get to the question of Westinghouse' alleged negligence, you must first decide whether the crate in question belonged to Westinghouse.

"If you decide that the crate did belong to Westinghouse, and it was in the lower hold of No. 5 hatch, your second question is: Was Westinghouse in the crating of such transformer negligent?

"Now, a person or a company is negligent if its conduct falls below the standard of conduct of that fictitious reasonably prudent person or company. In other words, the standard of care is the standard that the reasonable and prudent person or company would exercise under the same conditions.

"If conduct falls below that hypothetical standard of the reasonable prudent person or company, then you can say that such person or company is negligent.

"If you decide that Westinghouse was not negligent, then that is the end of the plaintiff's case against Westinghouse, and you must return a verdict for it."

The jury returned a verdict as follows:

"The Court: Mr. Foreman, have you agreed upon a verdict?

The Foreman: Yes, Judge, we have reached a verdict. Would you like to hear it?

The Court. Please.

The Foreman: Westinghouse, no liability. Shipowner, one hundred per cent liability. We have reached a verdict regarding the compensation.

The Court: Yes, please.

The Foreman: The compensation: $49,000 plus medical expenses.

The Court: You mean plus the $571 that the men agreed upon?

The Foreman: The medical expenses.

The Court: There was one other question, you recall, that I asked you to report on, and that was whether you found that the plaintiff was guilty of contributory negligence in any respect. Did you have a verdict on that?

The Foreman: No, we don't have a verdict on that.

The Court: Would you please just consult with your fellows for a few minutes? You can do it in the room, if you wish. Would it be better to go to the room?

(The jury again retired to continue its deliberations.)

(At 5:20 p.m. the jury again returned to the courtroom.)

The Court: Mr. Foreman, have you considered that problem?

The Foreman: Yes, we have. We find no contributory negligence by the plaintiff."

After some argument we directed a judgment against Westinghouse in favor of the Venezuelan Line on the theory that it had breached its warranty with regard to the packaging of the crates and a judgment in favor of McGrath on the Venezuelan Line's claim against it for its alleged failure to perform its stevedoring work in a workmanlike fashion. The next day we advised counsel that we were recalling such rulings because of possible error and requested briefs on the issues raised by the third party complaints.

Before discussing the issues raised by the third party complaints we think it best to analyze the jury verdict insofar as it relates to Westinghouse.

Under our charge the jury by its verdict against the shipowner had to find that the plaintiff was injured in the lower hold of number 5 hatch when a slat on a crate containing a transformer broke because, as noted above, the jury was told to return a verdict for the *shipowner* and Westinghouse if the transformers were not stowed in the lower hold of number 5 hatch. Since the verdict was for the plaintiff against the shipowner it follows that it was a Westinghouse crate which broke.

Since it was a Westinghouse crate that caused the injury, the jury by its verdict, "Westinghouse, no liability," must have found under our charge that Westinghouse was not negligent. That is, they must have accepted the deposition testimony of Swift, the Westinghouse foreman of shipping and packaging, as to the construction and size of each of the four types of crates used by Westinghouse for the shipment of the transformers in question. It was his testimony that the four sizes of crates were 26″ x 26″ x 47″; 32″ x 30″ x 52″; 32″ x 30″ x 55″ and 36″ x 38″ x 60″; that all were made of Ponderosa pine or spruce; that the crates were of the slat variety, each slat being 6″ to 8″ wide and 3/4″ to 1″ thick, with three slats to a side, i.e., top, front and back, with a skid on the bottom made of hard wood 2″ thick. A diagram from the specifications identified by the witness is appended. He also testified that he had seen fellow Westinghouse employees standing on such crates. The transformers are crated, he testified, for the specific purpose of shipping them overseas. In order to lift the transformers when crated there are two lifting lugs attached to each side of the transformer so that hooks could be attached to the lugs between the openings of the slats.

According to Westinghouse's shipping memorandum there were 102 crates delivered to the ship of the Venezuelan Line, 38 crates each weighing 410 lbs. net and 460 lbs. gross, 28 crates each weighing 615 lbs. net and 680

lbs. gross, 29 crates each weighing 710 lbs. net and 775 lbs. gross and seven crates each weighing 1100 lbs. net and 1290 lbs. gross. From such descriptions it follows that the crates weighed 50, 65 and 190 lbs. according to its size.

If we are correct in our interpretation of the jury verdict, the next problem is whether Westinghouse, having been found not negligent, can be held liable on the shipowner's third party complaint on the theory of a breach of an express or implied warranty.

Although Westinghouse argues that the shipowner withdrew any claim of express or implied warranty when it consented to the pretrial order, we will assume that it did not.[1]

Although the pretrial order is inarticulately phrased, we will assume that there is a claim for a breach by Westinghouse of an implied warranty that the crated transformers were fit for their intended purpose. (There is no evidence whatsoever of any express warranty relating to the crates). Assuming, therefore, that there is a claim by the shipowner of a breach of an implied warranty, we are immediately confronted with the problem: what do those words mean in the context of this case since there was no testimony relating to the purpose of crating transformers for overseas shipment.

The shipowner relies heavily on *Simpson Timber Co. v. Parks*, 390 F. 2d 353 (9th Cir. 1968), particularly a footnote suggesting other possibilities of liability, *viz.*, "the shipowner was entitled to recover damages . . . for breach

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[1]The only reference in the pretrial order relating to this issue reads as follows: "That if the plaintiff recovers from the defendant and third party plaintiff said liability would have been brought about by the third party defendant's negligence and their breach of their warranty to perform their work in a workmanlike manner." And, the pretrial order stated as one of the issues to be tried, "Did defendant Westinghouse make or owe warranties to plaintiff and if so did it breach some."

by the manufacturer of implied-in-fact warranty that the packaging was suitable for its foreseeable use as a working floor for the longshoreman . . . ." *Id.* at 356, n. 4. However, in *Simpson* the court specifically found "that the manufacturer was negligent in packaging the bundle of doors and in failing to warn of the danger, and that this negligence was the sole cause of the longshoreman's injuries." *Id.* at 355.

Our problem is to decide whether Westinghouse in delivering the transformers in the crates above described impliedly warranted that they were fit for the contemplated shipment. *Eastern Motor Express, Inc. v. A. Maschmeijer, Jr., Inc.*, 247 F. 2d 826, 828 (2d Cir. 1957). Quite obviously the crates were for the purpose of preventing the transformers from coming in contact with other cargo. They were patently not an ideal or deceptive flooring or deck.

The packaging of a bundle of doors involved in *Simpson* was so radically different from the crated transformers in this case that it presents no parallel. There "[t]he doors were cut to leave openings for glass. The manufacturer packaged the doors in a stack forty-two inches high, with the window openings aligned so that a well was formed. A cardboard cover was wrapped around the center of the stack leaving the solid edges of the doors exposed but concealing the interior cavity. The cardboard-bound stack was then bound with two steel straps and wooden chocks fastened along one side to permit the stack to be handled by a forklift tractor. The completed bundle appeared to consist of solid wooden doors wrapped in a protective cardboard cover. When the bundle rested on its chocks the concealed well created by the window openings extended vertically through the package from top to bottom. The manufacturer gave no warning that the cardboard cover concealed a well, by notice on the package or otherwise. Printing on the package identified

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the contents as 'fine doors,' and stated that the cardboard cover was not to be removed until the doors were unpacked for installation." The longshoreman in that case stepped upon the bundle; the cardboard cover did not withstand the weight, and the longshoreman fell 42". *Simpson Timber Co. v. Parks*, 369 F. 2d 324, 326 (9th Cir. 1966).

Since there was no evidence of the purpose of the crating other than for overseas shipment we cannot speculate, nor can Westinghouse be held to have breached its implied warranty that they were fit for their contemplated shipment.

Accordingly, we direct judgment in favor of Westinghouse on the defendant's and third party plaintiff's complaint against it.

The third party complaint against the stevedore, McGrath, for its failure to perform its stevedoring in a workmanlike fashion presents different problems. It will be recalled that the shipowner rested its case without offering any evidence, relying, we were told, on the evidence submitted by the plaintiff. When the shipowner rested, McGrath moved to dismiss the third party complaint against it and decision was reserved.

The first question, therefore, is whether we are constrained to consider only the evidence in the case at the time of that motion or must we consider all of the evidence in the entire case. We are satisfied that the law requires that we consider all of the evidence in the entire case. *Bates v. Miller*, 133 F. 2d 645 (2d Cir.), cert. denied 320 U. S. 210 (1943); *A. & N. Club v. Great American Insurance Co.*, 404 F. 2d 100 (6th Cir. 1968); 9 Wigmore, Evidence, section 2496 (3d ed. 1940).

The nub of the shipowner's claim against McGrath is that it permitted its employees to walk on crates the slats of which were only 1/4" thick instead of, as plaintiff's expert testified, causing the employees to use plywood on top of the crates as a walking surface.

This argument is based on the testimony of plaintiff's fellow worker who estimated the thickness of the slats at about 1/4" thick and plaintiff's expert who opined that 1/4" thick slats were insufficient for walking and that plywood should have been used for a walking surface. However, when McGrath moved to dismiss when the shipowner rested without offering any evidence of its own, its counsel stated its position as follows:

> "MR. TESORIERO: My claim against John W. McGrath is that the plaintiff himself would have been contributorily negligent if he walked on quarter-inch slats. That negligence is imputed to his employer and makes the employer liable to the vessel owner.
>
> Secondly, if all these transformers had slats one-quarter of an inch in thickness, the testimony was that that was not sufficient, that they had notice that these transformer slats, if they were one-quarter of an inch thick, would not have sustained the weight of a man, and walking boards should have been put over the cargo, and that again would have been a breach of the implied warranty."

Since the jury found the plaintiff not to be contributorily negligent we need deal only with the second argument. Factually that argument is unsound. First, the plaintiff's witness gave only an estimate as to the thickness whereas plaintiff proved from the actual specifications of Westinghouse that they were 3/4" to 1" thick and employees of Westinghouse were seen standing on top of the crates. Plaintiff's expert conceded that 1" thickness was a satisfactory walking surface.

The shipowner also relies on the expert testimony of the Westinghouse witness, Keeler, that it was not customary or safe practice for longshoremen to walk on top of slatted crates.

Since, however, the jury found the plaintiff was not contributorily negligent, the only way that the shipowner could succeed against McGrath was to have offered proof that the stevedore knew or should have known that the crates were unsafe for its employees to walk on. As to this there was absolutely no proof.

Accordingly, we direct judgment in favor of McGrath on the shipowner's third party complaint against it.

These are orders. No settlements are necessary.

Dated, New York, N. Y., July 17, 1970.

THOMAS F. MURPHY
U. S. D. J.

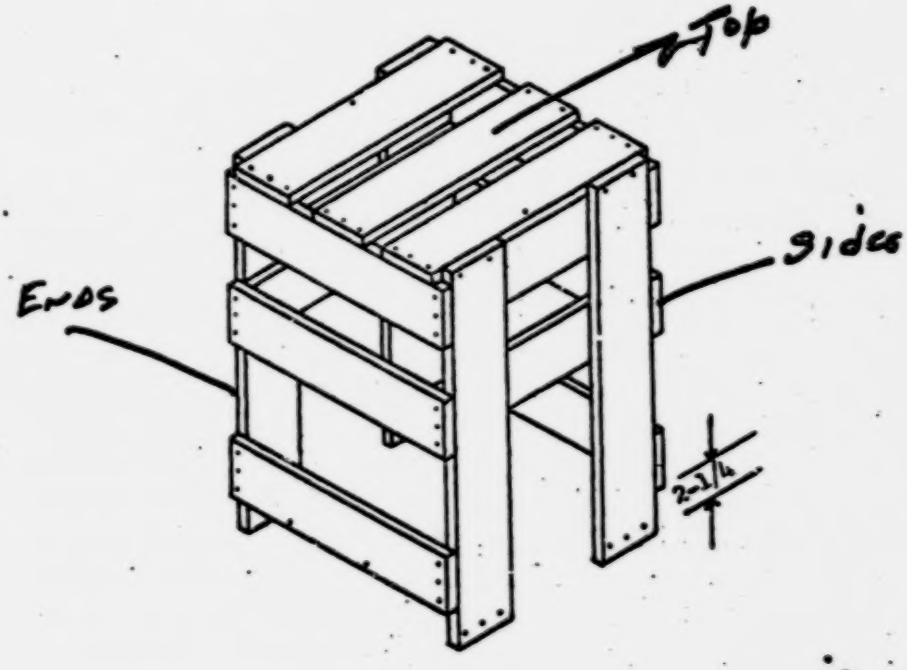
District Court Opinion

SKETCH SHEET

(Plaintiff's Exhibit 5)

WESTINGHOUSE ELECTRIC CORPORATION

Export Crate
General Construction
for
3 through 25 KVA Dist. Transformers, Wall or Cover mounted bushings.



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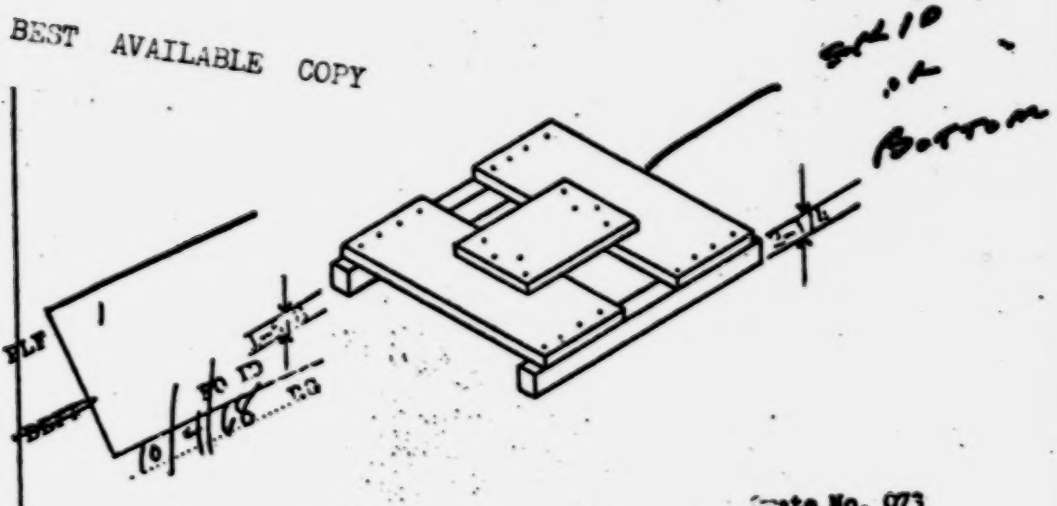

Sharon Works W.J.Swift 10/15/58

Page 1

SKETCH SHEET (Plaintiff's Exhibit 5)

WESTINGHOUSE ELECTRIC CORPORATION

Export Crate No. 073
25 KVA Transformers, Cover mounted bushings.
15-1/4" Dia. Tank.

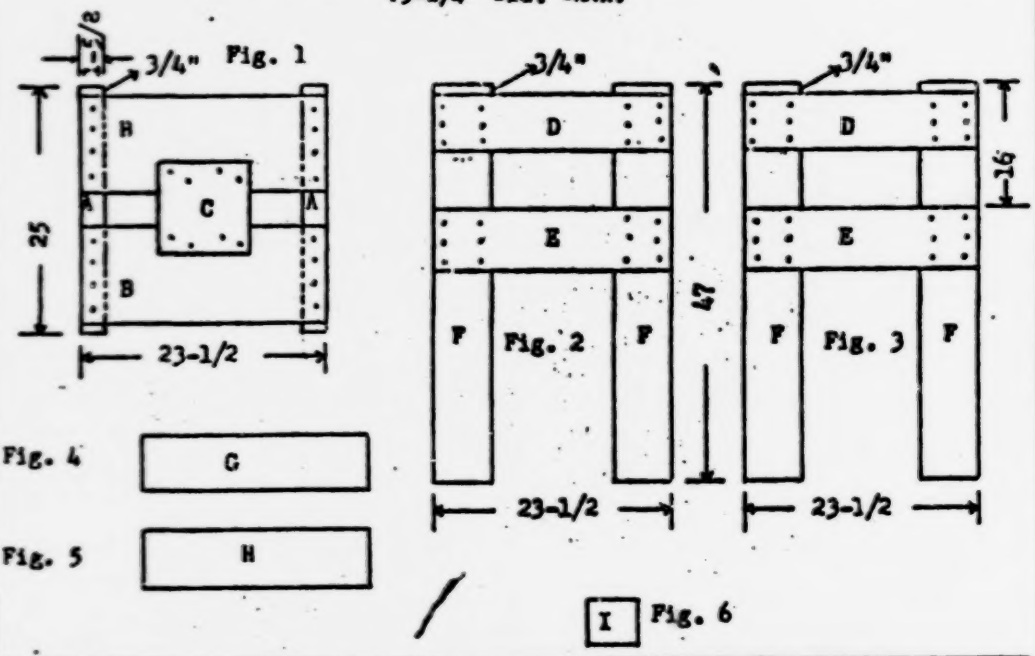

Fig.	Part	Item	Pcs.	Dimensions	Material
1	Skid	A	2	2 x 2-1/4 x 25	Spruce or Pine
		B	2	1-1/4 x 10 x 23-1/2	Spruce or Pine
		C	1	1 x 7-1/2* x 13-1/4	Spruce or Pine
2 & 3	Ends	D	2	1 x 6 x 23-1/2	Spruce or Pine
		E	2	1 x 5* x 23-1/2	Spruce or Pine
		F	4	1 x 6 x 47	Spruce or Pine
4	Sides	G	6	1 x 6 x 25	Spruce or Pine
5	Tops	H	3	1 x 6 x 25	Spruce or Pine
6	Blocks	I	2	2 x 4 x 4	Spruce or Pine

Notes.
1. Box Shop—*Indicates dimensions must be exact. Fig. 1, 2, & 3 assembled by Box Shop. Secure (B) to (A) Fig. 1 with (8) 10d nails each member (B). Secure skid block (C) to (B) with (8) 8d nails, clinched, and centered on skid. Secure (D) & (E) to (F) Fig. 2 & 3 with (12) 6d nails each, clinched. Sides, tops & blocks cut by Box Shop and stocked in packing area.
2. A-90—Assemble crate. See Page 1 for general crate construction and nailing pattern. Assemble side boards with (6) 8d nails each; outside top boards with (11) 8d nails each, and middle top board with (6) 8d nails. Position unit on skid. Assemble crating pin S#227A911H01 with 1/16" x 5/8" steel cotter pin through holes in lifting lugs. Place crate over unit. Nail to skid with (3) 8d nails through each vertical member to skid runner and (2) 8d nails through each bottom side board to skid deck.
3. A-90—Single hanger bracket units—Position blocks Fig. 6 between each lug and end board (E). Band in crate from each lug and top hanger bracket

SKETCH SHEET

WESTINGHOUSE ELECTRIC CORPORATION

Export Crate No. 073
25 KVA Transformers, Cover mounted bushings.
15-1/4" Dia. Tank.

to end board (E) with 5/8" x .020 Acme steel strap. Secure 2" blocks Fig. 6 to board (E) with (2) 8d nails each.
4.. A-90--Double hanger bracket units—Position blocks Fig. 6 between each lifting lug and end board (E). Band in crate from each lifting lug to board (E) with 5/8" x .020 Acme steel strap. Secure 2" blocks Fig. 6 to board (E) with (2) 8d nails each.

Transformer Outline Drawings

54C4501	Line 6
54C4502	Line 6
54C4517	Line 6
54C4518	Line 6
54C4523*	Line 6
54C4524*	Line 6
54C4591	Line 6
54C4592	Line 6
54C4594*	Line 6
54C7060	Line 6
324B2498	Line 6
327B419	Line 6
326B112	Line 4

*Double hanger bracket units.

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Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIMON WILLIAMSON,

Plaintiff.

against

COMPANIA ANONIMA VENEZOLANA DE NAVEGACION (Venezuelan Line),

Defendant and Third-Party Plaintiff.

against

JOHN W. McGRATH CORPORATION and WESTINGHOUSE ELECTRIC INTERNATIONAL CO.,

Third-Party Defendants.

67 Civil 1582

The issues in the above entitled action having been brought on regularly for trial before the Honorable Thomas F. Murphy, United States District Judge and a jury, on February 16, 17 and 18, 1970, and the jury having returned a verdict in favor of the plaintiff, and judgment having been entered in favor of the said plaintiff on February 25, 1970, and the Court having reserved decision on the third party complaint, and the Court

Judgment

thereafter on July 16, 1970, having handed down its memorandum decision in favor of the third party defendants, it is,

ORDERED, ADJUDGED and DECREED: That the third party defendants John W. McGrath Corporation and Westinghouse Electric International Co., have judgment against the defendant/third party plaintiff Compania Anonima Venezolana De Navegacion (Venezuelan Line) dismissing the third party complaints.

Dated: New York, N. Y.
July 17, 1970

JOHN LIVINGSTON
Clerk

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 867, 868—September Term, 1970.

(Argued June 10, 1971 Decided August 16, 1971.)

Docket Nos. 35420, 35421

SIMON WILLIAMSON,

Plaintiff-Appellee,

—v.—

COMPANIA ANONIMA VENEZOLANA DE NAVIGACION (VENEZUELAN LINE),

Defendant-Appellant,

and

WESTINGHOUSE ELECTRIC INTERNATIONAL CO.,

Defendant-Appellee,

COMPANIA ANONIMA VENEZOLANA DE NAVIGACION (VENEZUELAN LINE),

Third-Party Plaintiff-Appellant,

—v.—

JOHN W. MCGRATH CORPORATION and WESTINGHOUSE ELECTRIC INTERNATIONAL CO.,

Third-Party Defendants-Appellees.

Opinion of the Court of Appeals

Before:

FRIENDLY, MANSFIELD and OAKES,
Circuit Judges.

Appeal by shipowner from a verdict in favor of plaintiff longshoreman for injuries sustained while loading cargo and in favor of third-party defendants stevedore and shipping company on defendant shipowner's third-party complaints seeking liability over.

Affirmed.

LESTER E. FETELL (Sergi & Fetell, Brooklyn, New York), *for Plaintiff-Appellee.*

RENATO C. GIALLORENZI, New York, New York, *for Defendant-Appellant and Third-Party Plaintiff-Appellant Venezuelan Line.*

JOHN NIELSEN (Fogarty and Nielsen, New York, New York), *for Defendant-Appellee and Third-Party Defendant-Appellee Westinghouse Electric Corporation.*

JAMES M. LEONARD (McHugh, Heckman, Smith & Leonard, New York, New York), *for Third-Party Defendant-Appellee John W. McGrath Corporation.*

OAKES, *Circuit Judge*:

This is an appeal by the shipowner, Venezuelan Line, from a judgment for plaintiff, a longshoreman injured when a slate in a cargo crate on which he was standing during the course of his work broke. On appeal the shipowner claims the liability over of the stevedore (Mc-

Grath) and/or the shipper (Westinghouse), contributory negligence of the plaintiff, an error in the trial court's charge on unseaworthiness, and an excessive award of damages to the plaintiff.

The jury found no contributory negligence on the part of the plaintiff, no negligence on the part of Westinghouse, 100 per cent liability for unseaworthiness on the part of the shipowner and $49,571.00 damages. On consideration of all of the evidence, the trial court found that there was no factual basis in the light of the verdict for a finding that any of the stevedore's employees could have known the slats were insufficient, and directed judgment for the stevedore on the shipowner's third-party complaint.

The court also dismissed the third-party complaint against the shipper on the basis that the shipper could not be held to have breached any implied warranty that the crates were fit for their contemplated shipment.

Appellant's main argument as to plaintiff's contributory negligence and for liability over against the stevedore, the shipper or both is based on the testimony of plaintiff's fellow worker and eye witness Pizzo. Pizzo testified that the slats on the crate in question were four in number, about four feet long, "about a quarter of an inch" thick and "about an inch and a half, two inches" wide. These were supposed to be the top slats of the crate for a transformer, a crate, according to this witness, 4 feet wide, 4 feet long and 5 feet 5 inches high. On the strength of that testimony the shipowner argues that the plaintiff was contributorily negligent and that the stevedore was liable over because—even though the plaintiff was found by the jury not to be contributorily negligent—his fellow employees should have seen the danger in the situation and should have laid a flooring over the crates, as with dunnage, before permitting its employees to walk over them.

Failure to do so, the argument runs, was a breach of the stevedore's implied warranty of workmanlike performance. *Mortenson* v. *A/S Glittre*, 348 F.2d 383, 385 (2d Cir. 1965).

Similarly on the strength of Pizzo's testimony, the shipowner seeks indemnity from the shipper on the ground that quarter-inch slats on a crate were not built to sustain the weight of a longshoreman, and that the shipper should have known that longshoremen walk on crates during cargo operations. *Simpson Timber Co.* v. *Parks*, 390 F.2d 353 (9th Cir.), *cert. denied*, 393 U.S. 858 (1968). This case presents, then, the unusual factual situation where the shipowner's defense against the injured plaintiff and claims over against the third parties turns on the defendant's asserting the credibility of plaintiff's own witness.

We agree with the conclusion of the court below that the jury, in finding the plaintiff not contributorily negligent, discarded his fellow worker's testimony as to the slat dimensions. That testimony was countered by plaintiff's own Exhibit 5, setting forth the dimensions and specifications for export crates for Westinghouse transformers. These show the top slats should have been 1"x6"x25", and three in number, to be nailed with ordinary 8d nails. The 1" thickness is specified, but, as plaintiff's witness Swift, the Westinghouse shipping and packaging foreman, testified, the rough finished wood, ponderosa pine or spruce, was actually closer to ¾" in thickness. The dimensions for each crate varied slightly with the voltage and size of the transformer, according to the foreman Swift, who supervised the crating operation, from 26"x26"x47" to 36"x38"x60" overall.[1] From his testimony it appeared that

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1 The 47" and 60" dimensions, respectively, are the height of the crate, housing an ordinary cylindrical distribution transformer such as one sees on electric and utility poles anywhere.

the crates for this shipment were built according to specification. One hundred two of these crates, weighing a total of 68,025 pounds, i.e., approximately 667 pounds each on the average, were stowed in the No. 5 hatch, 85 of them in the lower hold aft, where the plaintiff's injury occurred.

There was ample testimony permitting the jury to infer that the injury occurred as the result of a latent defect in one of the slats which was between 26" and 36" long, 5" and 7" wide, and ¾" and 1" thick. There was expert evidence from a marine surveyor who had considerable maritime experience with general cargoes, including transformers, justifying a jury finding that transformers crated according to the shipper's specifications would readily support a longshoreman's weight and would customarily be handled by walking on top of crates already stowed, building up the level of the cargo all around, without using dunnage for walking purposes. Besides this affirmative evidence the jury did not have to leave its common sense outside the jury room: the idea of crating 600-pound transformers with orange-crate slats, ¼" thick and 1½" or 2" wide, as Pizzo—no doubt out of overzealous regard for his fellow worker's injuries—would have had the jury believe were used, strikes us as incredible on its face. Every longshoreman walking on the crates would have been injured and the transformers in a shambles had this been the case. Rather, the jury chose to believe the plaintiff's and Westinghouse's proof that the transformers were crated according to specifications; it is precisely on this basis that the verdict may be explained.

With Pizzo's slat-dimension testimony out of the case, the Venezuelan Line's case on liability tumbles, like the proverbial house of cards. The plaintiff was not contributorily negligent as a matter of law in doing something

customarily done; similarly the stevedore's other employees could not be required to have foreseen any danger from following this customary stevedoring practice. While the shipper's liability stands on a different footing, there is no requirement that a shipper provide an absolutely safe container on which longshoremen or crew may walk. It is enough that the shipper be free from negligence. The Carriage of Goods by Sea Act, 46 U.S.C.A. §1304(3), to which the instant bill of lading was subject, so provides.[2] The Act here applies. *Serrano* v. *United States Lines*, 238 F. Supp. 383, 388 (S.D.N.Y. 1965). Unlike *Simpson Timber Co.* v. *Parks*, 390 F.2d 353 (9th Cir.), *cert. denied*, 393 U.S. 858 (1968), the jury here found no negligence on the part of the shipper; in *Simpson* the jury found that the shipper had negligently packaged a bundle of doors and failed to warn of the danger. 390 F.2d at 355.[3]

The trial court's charge on seaworthiness, objected to also, was that if the jury found that plaintiff was injured "when a slat on a crate on which he was standing during the course of his work broke, then you must find that the shipowner was liable to the plaintiff." While this is very brief and to the point and not containing the usual "seaworthiness" boilerplate, it produced no error in this case in light of the jury's obvious rejection of Pizzo's testimony that the slats were only ¼" thick, for as the court pointed out the presence of a cargo container or crate with a latent defect causing injury renders a vessel unseaworthy.

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2 "The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants." 46 U.S.C.A. §1304(3).

3 An earlier opinion in *Simpson*, 369 F.2d 324 (9th Cir. 1967), sets forth the facts more explicitly than the later one: a cardboard container of a bundle of doors concealed a well 42" deep, where the doors had window openings; this was a trap for the longshoreman.

Gutierrez v. *Waterman S.S. Corp.*, 373 U.S. 206, 212-13 (1963); *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962); *Reddick* v. *McAllister Lighterage Line, Inc.*, 258 F.2d 297, 299 (2d Cir. 1958). While it may seem unfair to a shipowner that he be held responsible for a latent defect in a cargo container, he can recover over if he proves the shipper negligent, *Simpson Timber Co.* v. *Parks, supra*, 390 F.2d at 355, and the doctrine of unseaworthiness is not exactly a narrow one. *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 (1960); *Oliveras* v. *American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814 (2d Cir. 1970).

The shipowner complains that the verdict of $49,000 plus medical expense of $571 is excessive. Appellant concedes that the plaintiff's loss of earnings up to the date of his retirement was $4,725, and indeed the jury could have found it was in excess of $6,000. Moreover, plaintiff was forced to retire at the age of 64 when he had a work life expectancy, according to the U. S. Department of Labor "work expectancy tables" apparently relied upon by the plaintiff in argument, and not objected to, of six years. At $4 an hour, this alone would have justified a verdict larger than the one rendered. The jury may well have considered, however, that plaintiff would have retired at age 65, but even on that basis the verdict is still supportable. He retired on May 1, 1969; he reached 65 on March 5, 1970; thus, he lost an additional 44 weeks' wages at $160 per week ($4 per hour), or $7,040. He had a permanent painful injury consisting of a chronic olecranon bursitis; a life expectancy of 13 years; and as symptoms of the injury restricted motion, lack of strength, tenderness and swelling in his elbow. The award here may properly be upheld as one for disability, pain and suffering. At least it is not so

excessive as to shock the court's judicial conscience. *Gruenthal* v. *Long Island R. Co.*, 393 U.S. 156 (1968); *Vaccaro* v. *Alcoa Steamship Co.*, 405 F.2d 1133, 1139 (2d Cir. 1968); *Dagnello* v. *Long Island R. Co.*, 289 F.2d 797 (2d Cir. 1961).

Judgment affirmed.

Judgment.

UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of August, one thousand nine hundred and seventy-one.

Present: HON. HENRY J. FRIENDLY, Chief Judge,
HON. WALTER R. MANSFIELD,
HON. JAMES L. OAKES, Circuit Judges.

Simon Williamson,
Plaintiff-Appellee,

v.

Compania Anonima Venezolana De Navegacion
(Venezuelan Line),
Defendant and Third-Party Plaintiff-Appellant,

v.

John W. McGrath Corporation, Westinghouse
Electric International Co.,
Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed with costs to be taxed against the defendant and third-party appellant Compania Anonima Venezolano de Navigacion.

A. DANIEL FUSARO,
Clerk,

By VINCENT A. CARLIN,
Chief Deputy Clerk.

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